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In The

Supreme Court of the United States

October Term, 1965

No. 438

ANDREWS VAN LINES, INC., and SECURITY VAN LINES, INC., APPELLANTS,

V.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants Andrews Van Lines, Inc. (Andrews), and Security Van Lines, Inc. (Security), appeal from the judgment of the United States District Court for the District of Nebraska entered ~~May 22~~ April 19, 1965, dismissing

their complaints, which prayed for an order setting aside an order of the Interstate Commerce Commission dated January 13, 1964, denying appellants' applications for grandfather certificates of public convenience and necessity and the Commission's order served February 26, 1964, denying appellants' petitions requesting a finding of general transportation importance. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the United States District Court for the District of Nebraska is unreported. Copies of the Opinion and Order are attached hereto as Appendix "A". A copy of the Commission Examiner's Report and Recommended Order is attached hereto as Exhibit "B". A copy of the Order of the Interstate Commerce Commission, Division 1, denying appellants' applications is attached hereto as Appendix "C" and a copy of the Commission's Order denying the petitions requesting a finding of general transportation importance is attached hereto as Appendix "D".

JURISDICTION

This suit was brought pursuant to the provisions of 28 U.S.C. Sec. 1336, to set aside orders of the Interstate Commerce Commission. The judgment of the District Court was entered on ~~May 22~~ April 19, 1965, and the Notice of Appeal was filed in that Court by Appellants on June 9, 1965. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C., Sections 1253 and 2101 (b). Many decisions, including *Schaffer Transportation Company* v. *United*

States, 355 U. S. 83, sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal.

STATUTES INVOLVED

Section 206 (a) (4) of the Interstate Commerce Act (49 U.S.C. Sec. 306(a)(4)

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission, in considering the issue raised by applications under Sec. 206(a)(4) of the Interstate Commerce Act (49 U.S.C. Sec. 306(a)(4) may distinguish between operations performed outside of the United States on the basis of whether or not the operations were conducted overland or otherwise.

2. Whether Congress, in amending Part II of the Interstate Commerce Act, by adding the Alaska "Grandfather" provisions (49 U.S.C. Sec. 206(a)(4)), intended to limit the Interstate Commerce Commission to a consideration of overland operations between Alaska and the contiguous 48 states, determining whether or not, on the "grandfather" date, the applicant was engaged in the transportation of passengers or property, as a common carrier, by motor vehicle, between places in the United States and places in Alaska.

STATEMENT

This proceeding involves applications filed by appellant, Andrews Van Lines, Inc.,[1] and appellant Security Van Lines, Inc., under the provisions of Sec. 206(a)(4)

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1 This application was originally filed by Albert Roy Andrews, an individual, doing business as Andrews Van Lines. At the hearing, Andrews Van Lines, Inc., as the corporate successor to Mr. Andrews, was substituted as the applicant in this proceeding.

of the Interstate Commerce Act (49 U.S.C. Sec. 306(a)(4)) seeking certificates of public convenience and necessity, authorizing the continuance of operations, in interstate or foreign commerce, as common carriers by motor vehicle, between points in Alaska, on the one hand, and, on the other, points in the contiguous 48 states.[2]

The filing of these and numerous related applications was prompted by a sequence of events beginning on August 26, 1958, when the electorate of Alaska, then a territory, voted to accept statehood under the terms of the Alaska Statehood Act. On January 3, 1959, Alaska formally became the 49th state of the Union and for-hire motor carriers operating in interstate or foreign commerce therein concurrently became subject to Part II of the Interstate Commerce Act. The Alaska Statehood Act did not attempt to deal with all of the facets of the transportation situation resulting from the change in Alaska's status, and its legislative history makes it clear that the omission was purposeful and that transportation was to be subsequently considered in its various aspects.

In 1960, Alaska "grandfather" provisions were added to the Interstate Commerce Act, and appellants filed the subject applications thereunder. (Pub. L-86-615, § 1, 74 Stat. 382). Section 206(a)(4) is set forth at page 27 of Appendix A, herein.

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2 Security sought authority between points in Alaska and points in the continental United States. Andrews sought authority between Alaska, on the one hand, and, on the other, points in Colorado, Delaware, The District of Columbia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Washington, Wisconsin and Wyoming.

Hearings on appellants' and several related applications were held in Spokane, Washington, on June 25, through 29th, 1962; in Chicago, Illinois, on September 17 and 18, 1962; and in Anchorage, Alaska, on October 15, 1962.

In a Report and Recommended Order served July 10, 1963, the Interstate Commerce Commission's Examiners made the ultimate findings that the appellants, in their respective applications, had failed to establish the right to certificates of public convenience and necessity under the "grandfather" provisions of Sec. 206(a)(4) of the Interstate Commerce Act. Accordingly they recommended that the applications be denied. Although it is not immediately apparent from the reading of this Report and Recommended Order what specific grounds were utilized to fortify the conclusion that the respective applications involved herein should be denied, it appears that the basic reason for the recommended denial is the Examiners' conclusion that the right to "grandfather" authority may be established only by virtue of operations which took place entirely overland and their further conclusion that the applicants have not "established such operations on and continuously since the statutory date."

Both of the appellants filed Exceptions to the Examiner's Report and Recommended Order in which they urged that the Examiners had misapplied the applicable statutory standards and had erroneously concluded that only evidence of operations between Alaska and points in the contiguous 48 states which took place entirely overland, were entitled to be considered in determining whether or not operations had been conducted continuously on and since August 26, 1958, to such an extent

as to warrant the granting of a "grandfather" certificate.

On January 13, 1964, the Decision and Order of the Interstate Commerce Commission, Division 1, was served on the parties. In that Decision and Order, the Commission, Division 1, did not specifically discuss the issues raised by appellants in their Exceptions, but instead made a finding that the evidence considered in the light of these Exceptions did not warrant a result different from that reached by the Examiners, and that the appellants exceptions were not of such a nature as to require the issuance of a report by Division 1 discussing the evidence in the light of these Exceptions. The Division then entered an Order denying the applications effective February 3, 1964.

Thereafter, appellants then filed Petitions with the Commission requesting a finding of an issue of general transportation importance. Under the Commission's General Rules of Practice, the granting of such a Petition is a necessary requisite to an appeal to the full Commission for reconsideration of a Division order.[3] On February 26, 1964, the Commission ~~entered~~ served an Order denying these Petitions.

Thereafter, their administrative remedies exhausted, appellants filed the instant action in the Court below to set aside the Commissions' orders. The Court below upheld the Commission's orders and dismissed appellants' complaints.

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3 See Sec. 1.101(a)(3) and (4) of the General Rules of Practice Interstate Commerce Commission.

QUESTIONS ARE SUBSTANTIAL

This proceeding involves the first instance in which this Court has been asked to consider whether operations partly over water should be considered by the Interstate Commerce Commission in determining whether an applicant has made the requisite showing for a certificate of public convenience and necessity under the Alaska Grandfather provisions of Sec. 206 (a)(4) of the Interstate Commerce Act.

This proceeding is also of extreme importance because of the granting by the Interstate Commerce Commission of grandfather applications of other carriers, which applications were based in whole or in part upon operations conducted partly over water. The decisions of the Court below and of the Commission in the instant case are in irreconcilable conflict with the determination of the Commission to grant those other certificates.

The Commission and the Court below, without any proper basis in law or in fact, distinguised between land-sea transportation and all-highway transportation, granting consideration only to the latter mode.

The facts are not in dispute and the situation succinctly is not complex. The appellants contend that operations partly over water between points in Alaska and points in the contiguous 48 states during the critical period should have been considered and given weight by the Commission. The Commission, we submit, arbitrarily and unreasonably refused to grant any consideration or weight to those operations. Its action in doing so was affirmed by the Court below.

ARGUMENT

The Commission and the Court Below Failed to Give the Required Liberal Construction to § 206(a)(4); they Erroneously Refused to Consider Land-Sea Transportation in Determining Whether Appellants Have Met the Requirements of § 206(a)(4) and Erroneously Distinguish Land-Sea from All Highway Operations.

Appellants' basic contentions are first, that the Commission and the Court below failed to properly apply the liberal criteria of Sec. 206(a)(4) of the Interstate Commerce Act and instead applied more stringent standards of proof, which are not justified by the applicable statutory language; the second which can be viewed in effect as a manifestation of the first, or as a separate error, is a refusal to consider evidence of shipments which did not move entirely overland in their determination of whether or not appellants had satisfactorily met the requirements of Sec. 206(a)(4).

In enacting the Alaska "grandfather" provisions of the Transportation Act of 1960, Congress made one material and significant departure from previous grandfather legislation. Unlike previously enacted "grandfather" legislation (See Sec. 206(a)(1) and (2) of the Interstate Commerce Act) Public Law 86-615, codified as 49 U.S.C. Sec. 306(a)(4) imposes no requirement that an applicant for a grandfather certificate demonstrates that it was engaged in *bona fide operations* on the statutory date. Although the absence of this factor has been the subject of reported discussion by the Commission, See *Al Renk and Sons, Inc. - Alaska "Grandfather" Application,* 89 M.C.C. 91, the full significance of this material variance from previous grandfather legislation apparently escaped the Commission

and the Court below insofar as the discussion of these particular applications is concerned. The reports and orders of the Commission in this proceeding will be searched in vain for any reference whatsoever to the significance or relevance of the omission of the words "bona fide operations" from the statute in question. The Court recognized this variance but failed to give it proper affect.

In the *Renk* case, *supra,* the Commission did discuss the relevance of this factor. In that proceeding it was pointed out:

> "In the light of the known conditions prevailing in Alaska, and the legislative history of the 'grandfather' provisions, under consideration, the omission of the customary phrase, 'bona fide operations' must have been deliberate. It must have been the intention of the Congress not to require Alaskan 'Grandfather' applicants to prove that their operations on and after the critical date were as substantial and as frequent as those required in previous legislation to support a grant of 'grandfather' authority."

The effect of the presence of the words "bona fide operations" in other grandfather legislation has long been established. In *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, the Supreme Court considered the meaning of this phrase as used in the original grandfather provision of the Motor Carrier Act of 1935. The Court pointed out:

> "The Act provides the test of '*bona fide* operation'. That standard carries the connotation of substantiality. It also makes clear that a holding out to serve a specified area is not alone sufficient. It is 'actual rather than potential or simulated service' which is required. *McDonald* v. *Thompson,*

305 U.S. 263, 266. Substantial, as distinguished from incidental, sporadic, or infrequent service, is required."

Clearly, if the presence of the term "bona fide operations" is as significant as the quoted language from the *Carolina Freight Carriers* case indicates, the absence of that same phrase in the legislation under study here must be equally significant. In the *Renk* decision, the Commission recognized this fact and, in so doing, established a principle which was in harmony with the obvious legislative intent. The instant decision, however, is as far out of touch with the Congressional intent as the *Renk* decision is in harmony with it.

It is clear from the legislative history of Sec. 206(a)(4) that liberal consideration of the rights of grandfather applicants was intended both by Congress, and by the Commission. This liberal philosophy is reflected in House Report 1914 issued June 17, 1960, in which the following statement from the Interstate Commerce Commission's Committee on Legislation is quoted concerning the amendments in question:

"Under the 1950 amendments to Part II of the Interstate Commerce Act, the Commission was given jurisdiction over transportation by motor vehicle in commerce between places in the United States and places in its territories or possessions, but this jurisdiction was limited to regulating such transportation to the extent that it took place within the United States. Those amendments also gave to all holders of existing certificates or permits, authority to handle traffic destined to or originating in territories or possessions. In recognition of this situation, the Bill makes provision for two different types of motor carrier grandfather clauses. Under one, carriers holding certificates or permits to operate in the 48 States would have their oper-

ating rights extended to include service to such areas or points in Alaska which they in fact served prior to statehood on the grandfather date. The other type of grandfather clause would apply to carriers operating within Alaska in interstate or foreign commerce.

"Both types of grandfather clauses are more liberal as to routes used, points served, etc., than provisions in previous legislation of this nature. This, we believe, is desirable under circumstances where carriers are few and traffic is sparse. Otherwise services might be impeded and carriers might be reluctant to spend the time and money necessary to obtain extensions of their operating rights because of the small amount of traffic and the risks involved."

Moreover, in its report of July 16, 1959 (Report No. 399, 86th Congress, 1st Session), the Senate Committee, in reporting out S. 1509, (later enacted as Pub. L. 86-615) stated:

"It is known that many of the motor carriers that have been ready, willing, and able to serve large areas in Alaska, have not received business because sufficient economic development has not taken place in the territory to produce the necessary traffic. In awarding grandfather rights, the Commission should allow rights that will foster the establishment of economic motor carrier operations, that, in turn, will foster the development of the new state."

The liberality in construing the grandfather applications under Sec. 206(a)(4) which Congress urged in passage of that section is completely consistent with the findings of the United States Supreme Court in the *Carolina Freight Carriers* case, *supra,* where the Court observed:

"For this Act should be liberally construed to pre-

serve the position which those like appellants have struggled to obtain in our national transportation period."

However, rather than adhering to the liberal construction enjoined by the Legislative history of the section in question, the Commission's decision affirmed by the Court below in this proceeding is diametrically opposed to such a philosophy. In reality, the decision in this proceeding imposes requirements which are more stringent than those imposed in cases involving applications under conventional grandfather provisions in which proof of "bona fide operations" is indispensable. As is evidenced by the decision in *Winter Garden Co.* v. *United States*, 211 F. Supp. 280, a flexible approach which considers the "characteristics of the service" must be employed even when considering applications under the more stringent "bona fide operations" test. In that proceeding the Court pointed out:

> "Characteristics of the transportation service involved and the geographical area serviced are relevant to the territorial scope of the operations that may be granted under the 'grandfather' clause. *Alton R.R. Co.* v. *U.S.*, 315 U.S. 15, 21. While the test of 'bona fide operation' within a specified 'territory' includes 'actual rather than potential or simulated service', *McDonald* v. *Thompson*, 305 U.S. 263, 266, it does not necessarily restrict operations to the precise points or areas already served. Irregular or sporadic trips may be due to the characteristics of the service. Characteristics of the service may have restricted the operation to a few points in a wide area which the carrier held itself out to serve. Characteristics of service have been taken into consideration in determining the scope of the territory covered by certificates under the 'Grandfather Clause'. Operations on irregular

routes within a wide territory have been authorized in case of common carriers of household goods. *Bruce Transfer & Storage Co.*, 2 M.C.C. 150; *William J. Wruck*, 12 M.C.C. 150. Broad authority has been granted common carriers of oil field equipment and supplies. *Charles B. Gear, Jr.*, 3 M.C.C. 483; *Union City Transfer*, 7 M.C.C. 717; *Elsie Jones Trucking Co.*, 9 M.C.C. 740. A like result has been reached in the case of automobile transporters. *Alton R. R. Co.* v. *U. S.*, 315 U. S. 15, 20." 211 F. Supp. 280, 285-286.

The result in these proceedings is clearly out of harmony with such a liberal interpretation since the denial of these applications is predicated upon a very strict, narrow, construction of the statute. Such a position violates the Commission's duties under the Act, and requires that its decision be reversed.

Under § 206(a)(4), in order to qualify for a grandfather certificate, a carrier must demonstrate that, during the critical period, it continuously engaged in the transportation of property as a common carrier by motor vehicle between places in the United States and places in Alaska. The critical word in the statutory test is "engaged". Websters Dictionary (Copyright 1956) defines the word "engaged" as "occupied; employed; involved." Unquestionably appellants have been employed or involved, as common carriers by motor vehicle, in the transportation of property between points in the United States and points in Alaska. As noted above, this involvement has taken two forms. In one circumstance, the entire movement between Alaska and the contiguous States takes place overland. In the other cases, the lading moves in appellants' equipment in the contiguous states, and is transferred to a water carrier for that portion of the journal between

Seattle, Washington and an Alaskan port, and is there transported by appellants' agents for that portion of the trip within the State of Alaska proper.

In either of these two situations, the traffic moves on appellants through bills of lading, they retain responsibility for all loss and damage claims and collect all freight charges for the traffic. The charges for water or rail transportation are paid either directly by them or through their agents. (Tr. 976-981 as to Andrews and Tr. 871-875 and 886-887 as to Security).

The failure of the Commission and the Court to apply a liberal construction to the subject grandfather applications is most clearly illustrated by their refusal to consider other than wholly overland operations as a basis for establishing the right to a grandfather certificate under the statute. The basis for this refusal was stated by the Examiners at Sheet 4 of the Report and Recommended Order when they noted:

> "The Commission is without authority to grant certificates under the provisions of Section 206(a) of the Act except in respect of operation by motor vehicle. Transportation by water, rail, or air, is not transportation by motor vehicle and cannot form the basis for a grant of authority for motor vehicle operations under the 'Grandfather' provisions of the Act."

This position is inconsistent with the language of Sec. 206(a)(4) and with the liberal approach which Congress has required be applied in connection with applications of this type.

There is no basis in law or in fact for the distinction drawn by the Commission and the Court below between movements entirely overland and those moving by a land-sea-mode in determining what operations will

be considered in an Alaskan "Grandfather" application proceeding.

In determining grandfather applications of this type, the Commission and the Court cannot close their eyes to the realities to the transportation situation between Alaska and its sister states. A large portion of the involved transportation has and will continue to take place in territory outside of the jurisdiction of the Commission. It is well settled law that the Interstate Commerce Commission has no jurisdiction to issue certificates to conduct operations beyond the borders of the United States. In *Bridgeway, Inc., Extension Alternate Canadian Routes,* 47 M.C.C. 359, 361, the Commission stated that:

> "Our jurisdiction to authorize such transportation extends only to that portion of the operation that *would be performed within the United States.*"

See also *Menard Common Carrier Application,* 67 M.C. C. 365, 366.

Clearly neither Congress nor the Commission has power or jurisdiction over Canadian highways and operations conducted thereon. Therefore, the reference to motor common carriers in the subject legislation must be interpreted to have reference only to that portion of the service which takes place wholly within the United States. That is to say that since Congress has no power to authorize the issuance of certificates to operate over Canadian highways, the reference to motor carrier operations does not take into consideration how a shipment may have moved *outside* the borders of the United States and Sec. 206(a)(4) must be interpreted to apply equally to the use of either the water route or the Alcan Highway route. This is the only reasonable interpretation inasmuch as both the water transportation

and, the overland transportation in Canada, take place in territory outside the Commission's jurisdiction. As long as the transportation performed within the Commission's jurisdiction is performed by appellants as motor carriers, they have satisfied their obligations under the Act.

Furthermore under the required liberalized interpretation of Sec. 206(a)(4), substitution of a sea-van or barge service for what, in most instances, is not a major portion of the movement is not so gross a deviation from a motor carrier operation as to destroy the motor carrier character of the entire movement. Appellants contend that nothing in the Act requires, or could reasonably be interpreted to require, that the movements in question must have been conducted entirely overland.

Not only is the combination motor-van, sea-van operation, such as appellants have performed, proper within the scope of the "grandfather" provisions herein concerned, but when compared with an entirely overland operation, the motor-water-motor-arrangement, as the evidence clearly shows, is far more practical as far as the carrier is concerned and results in greater service to the shipping public. It is faster more dependable service, also land-sea service permits far greater volumes and weights to be transported at one time. It eliminates delay necessitated by waiting to accumulate less than truckload shipments into truckload volumes before shipments. As pointed out in the *Renk* case, *supra*:

> "remoteness of Alaska from the rest of the country and the necessity (except for an extremely rugged overland operation) for Alaska traffic to come and go by air or sea, a circumstance giving a decided advantage to those few who * * * could

establish stateside contacts and make advantageous arrangements for through movement with the principal water carriers and the railroad."

The Court below did not even mention the appellants' contention and argument concerning the fallacy of distinguishing between land-sea and all-highway transportation so far as these applications are concerned.

The erroneous nature of the distinction drawn by the Commission and approved by the Court below is further demonstrated by a comparison of the following cases with the instant case.

In *Alaska Van and Storage Co., Inc., - Alaska Grandfather Application,* 94 M.C.C. 381, the Commission granted grandfather authority to the applicant to serve between certain points and areas in Alaska based on a showing of operations partly over water. That case involved shipments tendered to the applicant at Seattle, placed in vans and containers forwarded by water to Alaskan ports, from where they were transported to final destination. Certain of the shipments moved at points have no road facilities. (p. 383) The Commission noted that rail and water carriage was utilized to facilitate movement of some of the traffic to various parts of the Alaskan area. (p. 384)

In *Everett W. Hepp and Frank X. Chapados - Alaska Grandfather Application,* 94 M.C.C. 475, the shipments involved moved from Seattle by water to Alaskan ports, thence to points of destination.

Although it is not clear, from the opinions in the *Alaska Van and Storage Company and Hepp* cases, whether the water portion of the segment was over

open sea, beyond the borders of the United States, it apparently was, because as is noted in the *Reliable* case, *infra,* (page 83 of Appendix E), the factual situation involved in *Reliable* is not materially different from that involved in the other two cases.

The court below held these decisions inapplicable because the applications sought authority to provide transportation between points in Alaska. The Court does not explain why the water portion of the movements involved in those two cases could be considered there but not in the instant case. As noted above, portions of the water segments of the movements in all these situations was beyond the borders of the United States. The cases simply are not distinguishable on the basis suggested by the Court or on any other ground.

In *Reliable Transfer Corporation, Extension - Southeast Alaska,* No. MC 123297,* cited and referred to by the Court below on pages 9 and 10 of its opinion (pages 67-84 herein), Joint Board No. 142, recommended a grant of authority on evidence showing that part of the transportation involved was over the Marine Highway in Alaska. Clearly a portion of the movements was over other than inland water. In the report in *Reliable* (page 73 of Appendix E), it is unequivocally noted that a portion of the subject movements are over the open Pacific Ocean. Under the theory of the Commission and the Court below in the instant case, these movements could not be considered;

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* The Examiner's Report and Recommended Order is attached hereto as Appendix E. Appendices A and B attached to the Report in *Reliable* are not included in this statement because they are somewhat lengthy and not of particular significance. The Reports in *Hepp* and the *Alaska Van and Storage Company* cases are not appended hereto because they are reported as shown.

yet they were considered, properly so, we submit, in *Reliable*.

On the point in question, the *Reliable* case is in irreconcilable conflict with the decision in the instant case and we ask this Court to note probable jurisdiction and to subsequently determine whether the Commission was correct in the *Reliable, Alaska Van and Storage* and *Hepp* cases, or in the instant case.

The Court below attempts to distinguish *Reliable* stating that it was "apparently decided on its own particular set of facts". The Court does not explain how the Commission can properly consider movements partly over water, beyond the borders of the United States, in the three cases just discussed and refuse to do so in the instant case.

In holding that the liberal construction to be given the Alaska "Grandfather" provisions does not apply to the mode of transportation, the Court below states that the liberal construction required "has no reference to whether or not a motor vehicle must be involved in the action." The obvious answer to this is that motor vehicles are very much a part of the subject transportation; also the water segment of the movements is only a portion of or connecting link in such transportation. The fallacy of the court's holding in this regard is further exhibited by the fact that the Commission asserts and unquestionably has jurisdiction over movements, a part of which involve the use of piggy-back rail service.

Section 303(a)(3) of the Interstate Commerce Act (49 U.S.C. § 903(a)(3)), thought by the Court below to be controlling, is not applicable. That section applies

expressly only to common carriers by motor vehicle which were on the critical date engaged also in operations between the United States and Alaska "as a common carrier by water." The appellants have never engaged in operations as common carriers by water and, as the record shows, are without the appropriate facilities or equipment to conduct such operations. For this reason the report of the Federal Maritime Board, published at 6 FMB 245, cited by the Court, does not require a contrary conclusion. The appellants here are, and have been at all times pertinent, common carriers by motor vehicle.

The Court below erred in finding that Security Van Lines, Inc., which as the evidence shows and as conceded by that Court, conducted entirely overland operations at and/or prior to the critical date, has not shown itself entitled to a grandfather certificate on the basis of its overland transportation. As the Court concedes in its opinion, the showing required under the applicable statute need not be a substantial one. Security proved a number of all highway movements at and prior to the critical date. The action of the Commission in denying its certificate was arbitrary and unreasonable and should have been set aside by the court below for that reason. That Court sets forth no guidelines as the extent of all-highway operations, which it would require, or which the Commission should require to be shown, before granting such an application, nor does it give any meaningful indication as to the basis upon which it considered Security's showing in this regard inadequate.

The evidence in the instant case shows that Security conducted approximately one-half of its southbound movements of the subject traffic in an all-highway

mode prior and subsequent to the critical date (Tr. 883 and Ex 143). Its southbound traffic exceeds northbound traffic by a ratio of approximately 4 to 1 (Tr. 884), primarily because it can easily consolidate truckloads moving south, whereas much more difficulty is involved in consolidating truckload quantities northbound. Although the all-highway traffic moved by Security may not seem substantial in terms of its operations within the contiguous 48 states, it is substantial so far as Alaskan traffic is concerned. In any event, as the Court below observed, the traffic need not be substantial to support an Alaskan Grandfather grant of authority. When the liberal construction, which must be given to those provisions, is considered in the light of the evidence of all highway movements by Security it is submitted that its right to that authority based on its all-highway movements has been established.

The Court below is clearly in error in its discussion at the end of its opinion concerning the effect of a denial of the subject applications on the appellants. First, it should be noted that the decision of the Commission, affirmed by the Court below, would prevent appellants from moving any single-line traffic between Alaska and the contiguous 48 states. It would deprive them of all joint-line overland traffic between those points, except to the extent it could secure the consent of the only carrier presently authorized to conduct such service on a direct-line basis. It would deprive the appellants of all land-sea-land traffic except to the extent they could interline such traffic with other carriers.

It should be noted in this connection that there is no obligation, created by Part II of the act or otherwise, on any other carriers to interline Alaskan traffic with

these appellants, which are at the mercy of such carriers with respect to all interline traffic.

While the Court's opinion does not expressly so state, it indicates that the Court below is also apparently under a misapprehension as to the status of Arctic Moving and Storage, with which appellants have in the past interlined movements of the subject traffic. As the record shows, Arctic does not have authority from the Commission and could not participate with the appellants in the subject traffic if the appellants do not have the authority sought in the present proceeding.

CONCLUSION

The questions presented by this appeal are substantial and of public importance. They are questions of first impression. For the reason stated, it is urged that this Court note probable jurisdiction, consider this case on the merits and thereafter enter an order reversing the judgment of the District Court and remanding the case to that Court for disposition with this Court's opinion.

Respectfully submitted,

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Counsel for Appellants.

PROOF OF SERVICE

I, J. Max Harding, one of the attorneys for the appellants, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 5 day of August, 1965, I served copies of the following Jurisdictional Statement and attached appendices on the following counsel of record for the parties herein by mailing a copy to each of them in a duly addressed envelope with postage prepaid.

JOHN H. D. WIGGER
Department of Justice
Washington, D. C.

WILLIAM H. ORRICK, Jr.
Department of Justice
Washington, D. C.

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United States Attorney
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THOMAS H. PLOSS, Attorney
Interstate Commerce
Commission
Washington 25, D. C.

J. Max Harding

J. MAX HARDING
One of the Attorneys
for the Appellants

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Civil 735 L

ANDREWS VAN LINES, INC., a Corporation, and
SECURITY VAN LINES, INC., a Corporation,
Plaintiffs,

-vs-

UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION, Defendants.

ORDER AND JUDGMENT

The Memorandum Opinion prepared by Judge Robinson, which is being filed concurrently herewith, is adopted by the Court and is made to constitute the findings of fact and conclusions of law in the case.

On the basis thereof, it is ORDERED AND ADJUDGED that the relief sought by the complaint be denied and that the action be and hereby is dismissed.

DATED this 19th day of April, 1965.

Harvey M. Johnsen
CIRCUIT JUDGE
Richard E. Robinson
DISTRICT JUDGE
Robert Van Pelt
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIVIL 735 L

ANDREWS VAN LINES, INC., A Corporation, and SECURITY VAN LINES, INC., a Corporation,
Plaintiffs

vs

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

MEMORANDUM OPINION

APPEARANCES:

J. Max Harding, Esq., of Nelson, Harding & Acklie, NSEA Building, P.O. Box 2028, Lincoln, Nebraska 68501, for plaintiff Andrews Van Lines, Inc. and intervening plaintiff Security Van Lines, Inc.

Gerald Kadish, Esq., Department of Justice, Washington, D.C. for defendant United States of America.

Thomas H. Ploss, Esq., Washington, D.C. for defendant Interstate Commerce Commission.

Before JOHNSEN, Circuit Judge and ROBINSON and VAN PELT, District Judges.

ROBINSON, District Judge.

This is a proceeding before a three-judge court to have reviewed the findings and order of the Interstate Commerce Commission in regard to applications made by the plaintiff Andrews Van Lines, Inc., and the intervening plaintiff, Security Van Lines for certificates of public convenience and necessity authorizing the continuation of operations in interstate or foreign commerce as common carriers by motor vehicle, between points in Alaska on the one hand, and on the other hand, points in the contiguous 48 states. Jurisdiction exists in this Court pursuant to the provisions of 28 U.S.C. § 1836; venue pursuant to 28 U.S.C. § 1398.

Both of the plaintiffs have been involved in the transportation of household goods to and from Alaska using basically a motor-water-motor type system of transportation. When transporting goods to Alaska from the contiguous 48 states, plaintiffs transport the goods by motor vehicle to the State of Washington, most often Seattle. There the goods are sealed in a van for shipment to Alaska by water. Upon arrival in Alaska, the vans are picked up either by a railroad and delivered to the designated point or by an Alaskan trucking concern [Arctic Moving & Storage Company] which delivers the goods. On occasion, air transportation has been used and increasingly use has been made of the Alcan highway through Canada for overland motor vehicle shipments.

Neither company owns any real estate or trucking equipment in Alaska. Arctic Moving & Storage has basic control over all deliveries made and hires and pays all personnel involved in the Alaskan transportation, Public liability insurance is provided both by plaintiffs and by the Alaskan trucker. Plaintiffs remain responsible to the shipper although in the case of Security Van Lines, charge backs are made to Arctic Moving on any claims arising from Arctic's fault. None of the sea vans used for sea shipments are owned by Andrews.

By way of background the people of Alaska voted to accept statehood under the terms of the Alaska Statehood Act on August 26, 1958. On January 3, 1959, Alaska formally became our 49th state and for-hire motor carriers operating in interstate or foreign commerce concurrently became subject to Part II of the Interstate Commerce Act. The Alaska Statehood Act did not attempt to deal with the many facets of transportation affected by the new statutes of statehood,

such omission apparently being purposeful so that transportation problems might subsequently be considered in their various aspects.

In 1960 Congress added Alaska "grandfather" provisions to the Interstate Commerce Act. [Pub. L.-86-615 § 1, 74 Stat. 382]. The plaintiffs filed their present applications under that provision. Hearings were had and on December 18, 1963, the Interstate Commerce Commission denied the applications, adopting the report and order made by hearing examiners on July 10, 1963. Exceptions were taken and on January 13, 1964, the final Decision and Order of the Interstate Commerce Commission, Divison 1, was served on the parties, ordering that the applications be denied. Plaintiffs then requested a finding of an issue of general transportation importance which was denied by an Order from the Interstate Commerce Commission on February 26, 1964, thus exhausting the administrative remedies of the plaintiffs and setting the stage for the present proceeding.

The pertinent part of the controlling statute, Sec. 206[a][4] of the Interstate Commerce Act, now provides:

> ". . . any common carrier by motor vehicle which, on the date this paragraph takes effect, is the holder of a certificate or certificates described in paragraph (2) of this sub-section or issued under paragraph (3) of this sub-section or section 207(a), authorizing transportation by motor vehicle between places in the United States of passengers or property in commerce, between the United States and the territory of Alaska, and on August 26, 1958, it or its predecessor in interest was engaged in the transportation of passengers or property as a common carrier by motor vehicle between places in the United States and places in Alaska, and such

operations have been continued since that time * * * except * * * as to interruptions in service over which the carrier or its predecessor in interest had no control, shall be issued a certificate authorizing transportation to or from the points or areas in Alaska served by it, from or to all points in the other states of the United States, designated in the above-mentioned certificate or certificates held by the carrier, of passengers or the class or classes of commodities specified therein, to the extent that under the said certificates the carrier, prior to the date of admission of Alaska into the Union, was authorized to perform within the states all the transportation required for through motor vehicle transportation by the carrier to or from places in the territory of Alaska, without necessity will be served thereby and without further proceedings, if application for such certificate is made to the Commission as provided herein on or before December 31, 1960."

The important date, then, is August 26, 1958, at which time an applicant under this provision must have been "engaged in the transportation of passengers or property as a common carrier by motor vehicle between places in the United States and places in Alaska." It is the plaintiffs' contention, of course, that they were so engaged. More specifically, they contend that the Commission applied a more stringent standard of proof in applying this section than that which Congress intended and that it erred in not considering evidence of transportation to Alaska other than overland motor vehicle shipments. The Commission contends that it has jurisdiction only over such overland shipments and that any other modes of transportation are thus irrelevant in the application of the "grandfather" provisions.

We agree with the plaintiffs' contention that the statute in question should be liverally construed. The his-

tory of the provision, coupled with a pertinent omission in the wording lead us to that conclusion.

The requirement that a carrier be engaged in "bona-fide operations" has been conspicuously left out of the statute. This wording has graced the structure of most "grandfather" provisions in this area. "That standard carries the connotation of substantiality. It also makes clear that a holding out to serve a specified area is not alone sufficient. It is 'actual rather than potential or stimulated' service which is required.—Substantial, as distinguished from incidental, sporadic, or infrequent service, is required." *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475 [1941].

In a case involving an application for a "grandfather" provision by an Alaskan trucking line, *Al Renk & Sons, Inc.* - Alaska "Grandfather" Application, 89 M.C.C. 91, it was very aptly pointed out:

> "In the light of the known conditions prevailing in Alaska, and the legislative history of the 'grandfather' provisions, under consideration, the omission of the customary phrase, 'bona fide operations' must have been deliberate. It must have been the intention of Congress not to require Alaskan 'Grandfather' applicants to prove that their operations on and after the critical date were as substantial and as frequent as those required in previous legislation to support a grant of 'grandfather' authority."

Without further quotation, suffice it to say that the historical background of this provision surely indicates an intention by Congress that the wording should be liberally construed. This was done in accordance with what was deemed to be the economic interest of Alaska and in consideration of a presently sparse flow of traffic. The continued operation of many of these lines

was intended to influence the further economic growth of the area.

However, we find it to be equally clear that the liberal construction of the statute intended by Congress was aimed at the substantiality of the operations and not the mode of transportation. It was not to be required that a large and steady flow of operations be established before the "grandfather" provision would apply, but this has no reference to whether or not a motor vehicle must be involved in the action. The statute expressly and impliedly refers to motor vehicles. Any liberal construction to be applied is and must be applied only to motor vehicles, lest construction turn to destruction of the words themselves. The Interstate Commerce Commission does not have the power to grant a certificate under the "grandfather" provision to allow the continuance of operations other than that of motor vehicles.

Along the same line, the same Act which added the "grandfather" provisions continued the jurisdiction of the Federal Maritime Board [now Federal Maritime Commission] over certain motor-water-motor or motor-water-land operations in § 303[e][3] of the Interstate Commerce Act [49 U. S. C. § 903[e][3]]:

> "Notwithstanding any other provision of this Act, any common carrier by motor vehicle which was engaged also in operations between the United States and Alaska as a common carrier by water subject to regulation by the Federal Maritime Board under the Shipping Act of 1916, as amended, and the Intercoastal Shipping Act of 1933, as amended, prior to January 3, 1959, and has so operated since that time, shall as to such operations, remain subject to the jurisdiction of the Federal Maritime Board."

The Federal Maritime Board issued a report pertinent to our proceedings, published at 6 F.M.B. 245, [1961] in which the Board said the following at page 251:

> "The entity which constitutes a 'common carrier by water in foreign commerce' as defined in the first section of the Act is subject to the provisions of the Act. The term 'common carrier' is not defined but the legislative history of the Act indicates that the person to be regulated is the common carrier at common law; One who holds himself out to carry for hire the goods of those who choose to employ him. Bauana Distributors, Inc. v. Grace Line, Inc., 5 F. M. B. 615, 620 [1959]. We have also held that a respondent's status as 'common carrier' does not depend on its ownership or control or means of transportation, but rather on the nature of its undertaking with the business which it serves. Where a party 'undertakes to transport from door to door it is a common carrier over the entire limits of its routes, both the portion over land and the portion over sea.' Where the respondent assumed complete responsibility for the safe transportation and delivery of goods entrusted to it from the time of receipt from the shipper until arrival at ultimate destination, it was held to be a common carrier by water. Bernhard Ulmann Co., Inc. 3 F.M.B. 771 [1952]."

From the nature of the plaintiffs' activities as they appear on the record, it would seem that they come within the above description of a common carrier by water so as to come within the jurisdiction of the Federal Maritime Commission, at least insofar as the shipping from Seattle to Alaska and vice versa.

Plaintiffs contend that the mode of transportation *extra* United States territory should be reduced to a common denominator so that the fact alone that ship-

ments of some kind have been made would render plaintiffs eligible for treatment under the "grandfather" provision. In the face of the express wording of the statute, i.e., "motor vehicles" and the fact that the Federal Maritime Commission has jurisdiction over the intercoastal shipping, we cannot accept this contention of the plaintiffs. This activity of the plaintiffs is simply beyond the jurisdiction of the Interstate Commerce Commission and as such is not relevant to any proceedings for relief under the "Alaska Grandfather" provision.

The plaintiffs have also cited a few recent decisions of the Interstate Commerce Commission which, they contend, indicate that water movements should be considered by the Commission in an application for certificates. Two of these decisions relate to applications for certificates to transport between certain points in Alaska. The Commission in those cases points out that it makes no difference that water movements were used in transporting the goods to Alaska, since the activities in Alaska were clearly those of the applicants. The use of water was simply not considered to be a determinative point, one way or the other, insofar as it had no connection with the Alaskan activities. *Alaska Van & Storage Co., Inc.*, 94 M.C.C. 381; *Hepp & Chapados Alaska "Grandfather" Applic.*, 94 M.C.C. 475. We do not believe that these cases have any application to the questions presented here.

In *Reliable Transfer Corporation Extension - Southeast Alaska.* [No. MC-123297]-M.C.C.-, the Commission had another application for a certificate permitting transportation between points in Alaska. In that case, part of the transportation was by water [over the Marine Highway in Alaska] and the Commission con-

sidered this in granting the application. This case is distinguishable on many grounds and was apparently decided on its own particular set of facts. There the water movement was the only mode of transportation because of the Alaskan terrain, the trucks themselves were transported rather than containers for the goods, the shipper never took control of nor responsibility for the goods [the movement was between points in Alaska rather than between Alaska and the contiguous 48 states,] and the trip was mostly on inland water. The Commission apparently determined that this is in effect a type of motor vehicle transportation because of the inherent nature of the thing. They also determined that the question of application of the Shipping Act of 1916 need not be answered. As we have pointed out above, we find that the Shipping Act must be considered in the case before us and in fact strips the Interstate Commerce Commission of jurisdiction over the water segment of the present application. For these reasons we feel that this case has no application to the proceeding before us now.

In regard to the overland motor vehicle shipments made by the plaintiffs we must also confirm the decision of the Commission. Andrews had admitted that it made no such shipment until 1959, obviously beyond the critical date of August 26, 1958, at which time such activities must have been engaged in to allow application of the "grandfather" provisions. Security appears to have engaged to a very small extent in overland shipments at and/or prior to the critical date, but there is sufficient evidence in the record to support the finding made by the Commission that this was not sufficient even under a liberal construction of the statute to meet the requirements of the "grandfather" provision in re-

gard to continuous operations. In the light of the foregoing, we have no choice but to confirm the Commission's findings in respect to actual overland shipments made by these plaintiffs. We may not, of course, substitute our own judgment for that of the Commission when it is acting within the scope of its authority and is supported by substantial evidence. *Watson Bros. Transp.* v. *United States*, 59 F. Supp. 762. [D.C. Neb. 1945].

The next point of importance concerns the purported agency agreements with the Alaskan truckers. If such agency agreements had been adequately established, the plaintiffs would be in a better position to ask relief at least in respect to shipments between points in Alaska. However, we can find no such adequate proof.

To have found the type of agency relationship necessary in this instance, the Commission must have found that plaintiffs dominated, controlled, and directed the operations to such an extent that they became, equivalently, the principals' operations. Thomson v. United States, 321 U. S. 19 [1944]. The shipment here was done with one bill of lading in one of the plaintiff's mastheads and at through rates published by plaintiffs. But these factors standing essentially alone as they do here are not sufficient to find the alleged agency and resultant control. We are satisfied that the record discloses sufficient evidence to find that the Alaskan "agent" was independent to a great enough extent that plaintiffs should not be allowed relief on that score.

An interesting point to note is that the result of these applications could very possibly be three certificates to operate arising out of only one operation. Security and Andrews have already asked for certificates arising

from the purported agency. If Arctic Moving & Storage has or does in the future request "grandfather" rights, one operation would result in three certificates if all were to be granted. It was not the intention of Congress that multiple rights be granted from one operation. *United States* v. *Rosenblum Truck Lines,* 315 U.S. 50, 53, 54. As we explained above, this result will not occur here, since it has been decided that the agency relationship did not exist. The multiple licensing possibility is one more reason in our opinion to affirm the decision and findings of the Commission.

In any case, we can see no reason why the grant or denial of a certificate of public convenience and necessity will have any effect on the operations of the plaintiffs - at least in respect to the methods which have been most often used by them. There will be no problems created in regard to the water transportation as pointed out above, and there is no reason why operations in Alaska cannot be continued as in the past. We can see no injury to the plaintiffs whatsoever by the decision herein made unless the plaintiffs have determined to change to more of an overland transportation than they used in the past. This, of course, would not help them to qualify for the "grandfather" provisions.

The foregoing shall constitute findings of fact and conclusions of law under Rule 52[a] of the Federal Rules of Civil Procedure.

A Judgment denying the relief sought by the Complaint and dismissing the action will be entered forthwith.

Dated this 19th day of April, 1965.

APPENDIX B.

INTERSTATE COMMERCE COMMISSION

Served July 10, 1963

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all other parties in interest, within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 20 days after the final date for filing exceptions. If the recommended order becomes effective as the order of the Commission, a notice to that effect, signed by the Secretary, will be served.

No. MC-1931 (Sub-No. 5)[1]

MOLLERUP VAN LINES ALASKA GRANDFATHER APPLICATION

Decided ———

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1 This report also embraces the following applications, the titles thereof consisting of the names mentioned below succeeded by the expression "Alaska Grandfather Application": Nos. MC-2934 (Sub-No. 3), Aero Mayflower Transit Company, Inc., MC-6922 (Sub-No. 6), American Red Ball Transit Company, Inc., MC-8768

1. In No. MC-107012 (Sub-No. 30), applicant found entitled to a certificate of public convenience and necessity, under the "grandfather" provisions of section 206(a) of the act, authorizing continuance of operation as a common carrier by motor vehicle of household goods, between points in Alaska, on the one hand, and, on the other, points in the Continental United States other than those in Alaska, by reason of having been engaged in such operation on and continuously since August 26, 1958. Issuance of a certificate approved upon compliance by applicant with certain conditions, and application in all other respects denied.

2. In the remaining proceedings embraced in this report, respective applicants found to have failed to establish the right to certificates of public convenience and necessity under the "grandfather" provisions of section 206(a) of the act. Application denied.

James F. Miller, James L. Beatty, John C. Bradley, George R. LaBissoniere, Charles M. Walters, J. Max Harding, Ramon S. Regan, William B. Adams, Wyman C. Knapp, G. M. Rebman, G. F. Gunn, Jr., W. T. Brunson, Martin A. Weissert, Carll V. Kretsinger, and for for one or more of the applicants.

(Sub-No. 25), Security Van Lines, Inc., MC-15735 (Sub-No. 15), Allied Van Lines, Inc., MC-22254 (Sub-No. 29), Trans-American Van Service, Inc., MC-26825 (Sub-No. 6), Andrews Van Lines, Inc., MC-36900 (Sub-No. 9), U. S. Van Lines, Inc., MC-40215 (Sub-No. 12), Richardson Transfer and Storage Co. Inc., MC-41098 (Sub-No. 9), Global Van Lines, Inc., MC-42866 (Sub-No. 7), National Van Lines, Inc., MC-52793 (Sub-No. 13), Bekins Van Lines, Co., MC-67234 (Sub-No. 6), United Van Lines, Inc., MC-70272 (Sub-No. 22), King Van Lines, Inc., MC-107012 (Sub-No. 30), North American Van Lines, Inc., MC-110149 (Sub-No. 4), Dean Van Lines, Inc., MC-110585 (Sub-No. 11), Republic Van and Storage Co., Inc., MC-112263 (Sub-No. 8), Martin Van Lines, Inc., and MC-115835 (Sub-No. 3), Express Van Lines, Inc.

Alan F. Wahlstetter, Julian C. Rice, Martin A. Weissert, and *Carll V. Kretsinger* for protestants in one or more of the proceedings.

William F. Meehan, Jr., for the Department of Commerce, State of Alaska.

REPORT AND ORDER

RECOMMENDED BY FRANK R. SALTZMAN AND JAMES C. CHESELDINE, EXAMINERS

These 19 so-called Alaska "grandfather" applications involve related issues, and will be disposed of in a single report.

The several applications were assigned to the examiners for hearing and the recommendation of an appropriate order thereon, and they were heard, on a consolidated record, at Spokane, Wash., June 25 through June 29, 1962, at Chicago, Ill., on September 17 and 18, 1962, and at Anchorage, Alaska, on October 15, 1962. Each of the applications is opposed by one or more motor common carriers operating in the affected territory, and the Department of Commerce, State of Alaska, intervened as its interest might appear.

All of the applications seek authority under the "grandfather" provisions of section 206(a) of the Interstate Commerce Act for the continuance of operation to and from points in Alaska, and most also seek authority for operation between points in Alaska, in the transportation of household goods as defined by the Commission. One applicant, Trans-American, also seeks authority for the transportation of pianos, typewriters, and self-propelled property-or passenger-carrying vehicles, but no evidence was submitted in respect of the movement of these items to, from, or between points

in Alaska on and continuously since the critical date for the determination of "grandfather" rights. The territorial scope of the authority sought by each applicant is set forth in Appendix A, hereto. All of the several applicants are seeking operating rights between points in Alaska, on the one hand, and, on the other, points in all or a number of continental States south of the southern Canadian border, hereinafter called the "South-48". The granting of "grandfather" authority for the continuance of such "overhead" service is provided for in section 206(a)(4) of the act. In addition, all applicants except Mollerup, Andrews, Richardson, Bekins, Dean, and Express seek authority, under the provisions of section 206(a)(5) of the act, for the continuance of operations between points in Alaska. Trans-American has included in its application a request for authority to operate between Seattle, Wash., and points within the South-48, as described in Appendix A, and certain other carriers have included a request for authority to operate to and from Hawaii. Such requests are beyond the scope of the benefits bestowed by the respective "grandfather" clauses indicated above.

For ready reference, the pertinent provisions of sections 206(a)(4) and 206(a)(5) are set forth in Appendix B hereto. Grants of authority under these provisions are dependent upon the establishment by the respective applicants that they were engaged in *operation* within the scope thereof on and continuously since August 26, 1958, hereinafter sometimes called the "statutory date" or the "critical date", which is the date on which the electorate of Alaska, then a Territory, voted to accept Statehood under the terms of the Alaska Statehood Act. Alaska formally became the 49th State of the Union on January 3, 1959, and for-hire motor

carriers operating therein in interstate or foreign commerce thereupon became subject to the applicable provisions of the Interstate Commerce Act. In the absence of "grandfather" legislation, the Commission found it expedient and desirable in many instances to issue temporary authorities, under section 210(a) of the act, to for-hire motor carriers said to be operating in Alaska in interstate or foreign commerce at the time of the State's admission to the Union and which concurrently became subject to the provisions of the act in respect of such operations. Applications for such temporary authority on behalf of some of these applicants were denied.

Common carrier facilities for the movement of household goods between points in Alaska and points in the South-48 have been available to the public for several years. Insofar as concerns the participation in such movements by motor vehicle, two distinct modes of transportation are and have been utilized, (1) an all-motor overland movement by highway from point of origin to point of ultimate destination, and (2) a combination movement utilizing, in addition to service by motor vehicle, service by water, rail, or air transportation. These combination movements, except those involving air transportation, move almost entirely through the Port of Seattle and are handled typically as follows: The goods are picked up in the South-48 by a so-called stateside carrier such as the applicants herein, are transported overland to Seattle where they are turned over to an Alaska-based carrier for consolidation and loading into so-called sea-vans, which are large containers, owned by the Alaskan-based carriers, resembling somewhat the body of a van-type motor vehicle; the loaded sea-vans are transported by the Alas-

kan-based carrier to the Seattle Port where they are loaded onto a steamship or barge and dispatched to Alaska in the name of the Alaskan-based carrier; the sea-van is then transported by the water carrier to an Alaskan port, there being turned over either to the Alaskan-Based carrier for direct overland delivery of the contents to the householder, or for movement to the warehouse of such carrier for break-bulk and subsequent distribution to the premises of the householder or householders whose goods are loaded therein. In the case of sea-vans moving into Alaska through the Port of Seward, the vans are generally transferred at Seward from the water carrier to the Alaska Railroad[2] for movement to an inland point, where they are then turned over to the Alaskan-based motor carrier for direct delivery to the householders or for break-bulk and subsequent delivery to the householder or householders whose goods are loaded therein. The sea-vans are transported by motor vehicle on flat-bed equipment and generally contain two or more separate shipments in a single van. The household goods handled by these applicants are generally covered by a single bill of lading issued on the masthead of a stateside carrier and covering movement from origin to destination at a single-factor rate. In some instances, the names of the motor carriers participating in the through movements are shown on the bill, but frequently they are not so shown, and in no instance are the names of the participating rail and water carriers shown.

One thing is abundantly clear, this Commission is not here concerned with movements other than those per-

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2 The Alaska Railroad is a Government-owned road operating between the Port of Seward and Fairbanks, through Anchorage. It also has a spur line extending to the Port of Whittier, and is the only form of land transportation to and from that point.

formed by applicants as *common carriers by motor vehicle.* The Commission is without authority to grant certificates under the provisions of section 206(a) of the act except in respect of operation by motor vehicle. Transportation by water, rail, or air is not transporation by motor vehicle and cannot form the basis for a grant of authority for motor vehicle operations under the "grandfather" provisions of the act. Further, it is clear that certificates granted under section 206(a)(4) must be limited to the authorization of service to and from points in the South-48 which the applicants were *certificated* to serve prior to the date Alaska was admitted to the Union, and then only to the extent that under such certificates they were authorized to perform *"within the States"* all transportation required for through *motor vehicle transportation* by the carriers to or from places in the territory of Alaska.

Evidence in support of the applications were submitted by the various applicants, including lists of shipments professed to have been transported between points in Alaska and points in the South-48 on and continuously since the critical date. Bills of lading or other documents supporting such lists were made available to protestants and other interested parties at the hearing, but were not submitted in evidence. Generally, the lists merely show the origin and destination of a particular shipment, with no indication as to the portion of such movement which was actually handled by motor vehicle or the points between which the respective applicants actually moved the shipment. Shipments are shown as originating at points in the South-48 which applicants are not authorized to serve, with no indication as to the portion of the movement handled by the particular applicant claiming rights thereunder.

In some instances, where shipments were admittedly made through the Port of Seattle, applicants were not authorized to serve Seattle and movements by motor vehicle to and from that point were either handled by applicants in violation of the terms of their certificates, or handled by some other undisclosed carrier on an interchange or "lease" basis. With few exceptions, the lists fail to disclose the Alaskan points between which motor vehicle transportation was utilized as distinguished from rail service provided by the Alaska Railroad. In some instances, the documentation supporting the lists are on the bills of carriers other than those claiming the rights. In no instance, is there any evidence of shipments moving between points in Alaska which were not moved in part by the respective applicants between points in the South-48.

In addition to the lists of shipments discussed above, a number of the applicants also submitted copies of tariffs filed with this Commission or the Federal Maritime Board, and so-called military rate tenders filed with and approved by the Department of Defense or subordinate offices thereunder. These publications and tenders, of course, are of value in this proceeding only to the extent of showing some sort of a holding-out on the part of the carrier to perform service (not necessarily motor service) at the time indicated. In many instances, the tariffs and tenders bear effective dates subsequent to the critical "grandfather" date and are of little probative value even in appraising the nature and extent of the holding-out.

Two of the applications, those of American Red Ball and Trans-American, must be denied in their entireties, regardless of other considerations, because the respective applicants have failed to establish that they conducted any motor operations or that they participated

in any movements of household goods to or from Alaska on or prior to the statutory date. The proposed holding-out of these carriers, without any actual operation commensurate therewith, cannot form a proper basis for a grant of "grandfather" authority. No further consideration will here be given to such applications.

As heretofore indicated, the Commission is here concerned only with operations conducted on and continuously since the statutory date *by motor vehicle.* The evidence lends itself to discussion under two general categories, (1) all-motor overland service between points in Alaska and points in the South-48, and (2) motor service conducted between points in Alaska incidental to through movements involving other modes of service, such as by water, rail, or air, to or from points in other States.

Overland Service Between Points in Alaska and Points in the South-48. Of the several applicants, only North American can qualify for a grant of authority in this category. It has conducted substantial overland operations between points in Alaska and points in the South-48 continuously since prior to the statutory date and is entitled to a certificate authorizing the further continuance thereof. Prior to the date of the admission of Alaska into the Union, it was authorized under an appropriate certificate issued by this Commission to transport household goods between points in the United States, and hence was authorized to perform "within the States" all transportation required for through motor vehicle movement to or from points within the Territory of Alaska, a condition to the granting of any authority under section 206(a)(4) of the act. North American is entitled to a certificate authorizing the continuance of its overland operations to and from points in Alaska. Of the other applicants, only a few

have established any significant amount of overland operations to and from Alaska, and none have established such operations on and continuously since the statutory date. In the circumstances, it will not be necessary to discuss any disability which these carriers may have had insofar as concerns operating rights "within the States" prior to the admission of Alaska into the Union.

Motor Service Between Points In Alaska: All of the applications will be considered in this category to the extent that motor operations are claimed to have been performed in Alaska on and continuously since the statutory date in connection with through service to and from points in other States and performed in part by other modes of transport. Certain of the applicants failed to include in their applications specific requests for authority to operate between points in Alaska, and one, Bekins Van Lines Co., amended its application at the hearing to eliminate a request for such authority which was included in its application as filed. In spite of protestants contentions to the contrary, this examiner is of the opinion that the initial requests by these applicants, which were timely filed, for overhead authority between points in Alaska and points in the South-48, are sufficient upon which to predicate consideration of that part of the claimed overhead operation which was performed by motor vehicle as an incident to the through movement. This is particularly appropriate here, where the record as a whole indicates a considerable amount of misunderstanding on the part of many of the applicants as to the exact meaning of the two "grandfather" clauses here under discussion. In other words, the action here proposed to be taken amounts to nothing more than the giving of consideration to the entire overhead movement for which au-

thority was initially requested and the rejection of such portions of the overhead authority sought which are not pertinent to the "grandfather" provisions, namely, those portions not performed by motor vehicle.

It is abundantly clear that none of the several applicants has ever actually conducted any motor operations in Alaska. Their claims to "grandfather" rights in this category are based upon the operations of certain Alaska-based motor carriers which they refer to as their agents. These so-called agents are motor carriers actually conducting common carrier operations in Alaska, utilizing their own vehicles and other facilities and employing their own personnel, including the drivers of the vehicles used and all other persons engaged in the conduct of the business. Their operations are not confined to the handling of traffic for any particular applicant. In addition to their operations as motor carriers, they forward traffic handled by them to or from points beyond Alaska by water and by air, such traffic being forwarded in their names and utilizing their sea vans or air vans which frequently contain the freight of two or more stateside carriers and freight forwarding companies. Most of the so-called agents have filed "grandfather" applications in their own names and are basing their claim to rights thereunder, to a considerable extent, upon the shipments which they have actually transported under arrangements with these stateside applicants and upon which the latter are also dependent for the establishment of their rights. In addition to the filing of "grandfather" applications by the so-called agents, the latter have entered appearances herein in opposition to the granting of the instant applications. Thus, there immediately arises the very important question as to which carriers are en-

titled to rights by reason of the operations shown to have been conducted on and since the statutory date. Obviously, two carriers cannot be awarded "grandfather" motor-carrier authority arising out of the same motor-carrier operation, and it becomes necessary, in a contest such as here presented, for the Commission to make a factual determination as to which of the contestants was, on and continuously since the statutory date, *engaged* in *operation* as a *common carrier by motor vehicle* in respect of the shipments shown to have been transported.

Of primary importance in the determination of such factual situation is the matter of which carrier, the stateside applicant or the so-called Alaska-based agent, owned the vehicular equipment utilized, or regardless of ownership of such equipment, which carrier dominated, directed, and controlled the movement thereof. On this score, the record clearly indicates that all vehicular equipment utilized in the Alaska operations under consideration was owned by the Alaska-based carriers, and that none of this equipment was ever actually leased to any of the stateside applicants. Most of the applicants admit that they neither owned or leased any of the equipment used in Alaska. One or two submitted copies of leasing agreements said to have been in effect on the statutory date, but there is no convincing evidence that any equipment was actually leased under the terms of such agreements. Moreover, it is difficult to see how such agreements could have been effective as bona fide leasing arrangements because of the fact that the lessors utilized such equipment for the handling of their own traffic and also the handling of goods moving on the "paper" of two or more stateside carriers or forwarding companies at

the same time. In addition to the fact that none of the several applicants are shown to have had any vehicular equipment dedicated to their exclusive use in Alaska on and since the statutory date, it is also clear that none had any other physical properties in Alaska such as storage warehouses, break-bulk or packing facilities, terminals, or even offices available for their use in handling movements of household goods.

All matters pertaining to the operation of the vehicles, and the direction and control of such operation were, on the statutory date, and still are, under the exclusive domination and control of the Alaska-based carrier. All drivers, dispatchers, supervisors, and others having to do with the operation of the vehicles were and are on the payrolls of the Alaska-based carriers and responsible directly thereto, and none of the applicants herein have ever had any of their own personnel assigned to duties in Alaska on other than a casual sight-seeing or exploratory basis.

About the only thing even associating these applicants with movements of household goods between points in Alaska is the fact that they executed bills of lading on their own mastheads showing through movements originating at or destined to points in Alaska, and that the shipments evidenced by such bills were moved on through rates published by them. Obviously, these facts, standing alone, are of little probative value here, particularly where the evidence otherwise definitely indicates that the carrier executing the bills did *not* perform all of the transportation evidenced thereby and where there is no showing of the extent of the motor service utilized in the through movement.

The conclusion is inescapable that one of these applicants was ever *engaged in operation as a common car-*

rier by motor vehicle between points in Alaska, except to the limited extent to which some are shown to have conducted overland services to or from points in the South-48, as heretofore discussed, and hence all of the applications must be denied insofar as authority is sought to operate between points in Alaska.

Findings. In consideration of all of the evidence submitted, the examiners find, in No. MC-107012 (Sub-No. 30), that North American Van Lines, Inc., is entitled to a certificate of public convenience and necessity authorizing continuance of operation, in interstate or foreign commerce, as a common carrier by motor vehicle of household goods, as defined by the Commission, between points in Alaska, on the one hand, and, on the other, points in the Continental United States other than Alaska, over irregular routes by reason of its having been engaged in such operations on and continuously since August 26, 1958. Issuance of a certificate approved upon compliance by applicant with certain conditions, and application denied in all other respects.

The examiners further find, in the other proceedings here considered, that the respective applicants have failed to establish the right to certificates of public convenience and necessity under the "grandfather" provisions of section 206(a) of the Interstate Commerce Act by reason of operations conducted on and continuously since August 26, 1958, and that the several applications should be denied.

In view of the findings herein, it is recommended that the appended order be entered.

By Frank R. Saltzman and James C. Cheseldine, Examiners.

(Signature) Frank R. Saltzman
(Signature) James C. Cheseldine

APPENDIX A

Mollerup Van Lines, Salt Lake City, Utah, filed December 30, 1960.

Between points in Alaska, on the one hand, and, on the other, points in Utah, Arizona, California, Colorado, Idaho, Montana, Nevada, Oregon, Washington, and Wyoming.

Aero Mayflower Transit Company, Inc., Indianapolis, Ind., filed December 28, 1960.

Between points in Alaska, and

Between points in Alaska, on the one hand, and, on the other, points in the United States.

American Red Ball Transit Company, Inc., Indianapolis, Ind., filed December 16, 1960.

Between points in Alaska, and

Between points in Alaska, on the one hand, and, on the other, points in the United States except those in Alaska, Nevada, Utah, Idaho, North Dakota, Montana, Oregon, and Washington.

Security Van Lines, Inc., Kenner, La., filed December 30, 1960.

Between points in Alaska, on the one hand, and, on the other, points in the Continental United States.

Allied Van Lines, Inc., Broadview, Ill., filed December 25, 1960.

Same as shown for Aero Mayflower, above.

Trans-American Van Service, Inc., Chicago, Ill., filed December 30, 1960.

Between points in Alaska, and

Between points in Alaska, on the one hand, and, on the other, points in the United States except those in Alaska, Oregon, Idaho, California, Nevada, Utah, Arizona, and New Mexico, and

Between Seattle, Wash., and points within 50 miles thereof, on the one hand, and, on the other, points in the United States except those in Oregon, Idaho, California, Nevada, Utah, Arizona, and New Mexico.

Note: This carrier also seeks authority for the transportation of pianos, typewriters, and self-propelled passenger or property carrying vehicles, between points in Alaska, and between points in Alaska, on the one hand, and, on the other, points in the United States.

Andrews Van Lines, Inc., Norfolk, Nebr., substituted as applicant at the hearing, in lieu of Albert Roy Andrews, doing business as Andrews Van Lines., filed December 29, 1960.

Between points in Alaska, and

Between points in Alaska, on the one hand, and, on the other, points in Colorado, Delaware, the District of Columbia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Washington, Wisconsin, and Wyoming.

U. S. Van Lines, Inc., South Bend, Ind., filed December 30, 1960.

Same as shown for Aero Mayflower, above.

Richard Transfer And Storage Co., Inc., Salina, Kans. filed December 30, 1960.

Between points in Alaska, and

Between points in Alaska, on the one hand, and, on the other, points in the Continental United States.